BRIEF IN SUPPORT OF THE PETITION.

Opinions Below.

The District Court delivered no written opinion. The opinion of the Circuit Court of Appeals is not yet reported, but will be found on page 101 of the record.

Jurisdiction.

Jurisdiction is invoked under Sec. 240 of the Judicial Code as amended by the Act of February 13, 1925; 43 Statutes at Large 938; United States Code Annotated, Title 28, Sec. 347.

Statement.

A statement of the petition for Declaratory Judgment and the motion to dismiss will be found in the petition, pages 5-10, *supra.*

Argument.

If certiorari is granted, we submit, with confidence, that we can demonstrate both upon reason and upon the authorities that the Federal District Court here has no jurisdiction, for the reasons following:

1. The petition reflects that respondent had itself decided the fact issue and concluded that the Jackson gas field is now insufficient and acting upon its own judgment contracted for pipeline gas and initiated and filed with the City of Jackson a schedule of rates two or three times higher than the schedule fixed by the Mayor and Commissioners of the City of Jackson as a rate-making body and approved and accepted by respondent and fully set forth in the contract franchise made Exhibit "A" to the original petition. The petition on its face declares "There is need for a Declaratory Judgment and ancillary relief" (Tr. 3);

that respondent had "filed with the City a gas rate for the service rendered as to all gas which plaintiff is compelled to purchase from said pipe line" (Tr. 16); that "for such pipeline gas so thus consumed by said City of Jackson and its inhabitants, plaintiff is entitled under said contract to have this right established and adjusted, and the right thus to do is that whereas to a declaration by this Honorable Court is requisite" (Tr. 15). The plaintiff has a prayer "for such other, further and general relief as in equity and good conscience may seem meet." Properly interpreted therefore, the petition not only prays for a proper declaration of rights, but for relief. Regardless of the prayer, the statute expressly provides "Further relief based on a Declaratory Judgment or decree may be granted whenever necessary or proper" 28 U. S. C. A. Para. 400 (2). The Circuit Court of Appeals, in its opinion, says "The allegations as to rates instituted by the plaintiff are not necessary to the tendered issue, no relief is asked as to them and they may and will be disregarded in the consideration and determination of the issue tendered for a declaration, whether the Jackson field is insufficient and if it is what are the rights of the parties." It is respectfully submitted that the Court has no right to ignore the allegations as to rates, the averment that ancillary relief is needed, and the prayer for general relief, and the manifest purpose and aim of the petition to be relieved from the rates fixed by the contract franchise, and therefore to suspend those rates altogether, and to be justified in the action of respondent in promulgating rates that are much higher, that have not been approved by the City of Jackson as a rate-making body, and that are, we submit, unauthorized and illegal. Respondent is here attempting to accomplish indirectly what cannot be done directly. It is axiomatic that an individual can not accomplish by indirection what is prohibited. The Johnson Act expressly provides that

"no District Court shall have jurisdiction of any suit to * * * suspend or restrain the enforcement, operation or execution of any order of an administrative board or commission of a State or any rate-making body, etc. * * * where such order affects rates chargeable by a public utility," etc. U. S. C. A. Title 28, Para. 41 (1). The old rate was fixed by ordinance and therefore is an order of a rate-making body. Its authority so to do is expressly conferred by the Legislature of Mississippi in Secs. 2393 and 2426, Mississippi Code of 1930 (see appendix). By statutory authority, the Mayor and Commissioners "have the power to enact ordinances for the purposes hereinafter named," including among others, the power "to prescribe by ordinance the maximum rates and charges for the supply of water, gas and electric energy or current for lights and power, or either, furnished by an individual, company or corporation to the municipality and its inhabitants or either, such rates and charges to be just and reasonable"; with the further provision that if the rates and charges be unreasonable they may be "reviewed and determined by the Chancery Court of the county, but the authority hereby granted shall not be construed so as to impair the effect or obligation of any valid or binding contract." In the exercise of that power, Sec. 3 of the contract franchise provides "pursuant to the municipality's rate-making power, and the terms and conditions upon which this franchise is given, the municipality establishes the following rates and charges for natural gas service in Jackson for gas taken from the Jackson, Mississippi, natural gas field or from commercial gas field within 40 miles radius within the State of Mississippi," followed by the schedule. No authority is given by this contract franchise, accepted in writing by respondent, to change the rates during the twenty-five year term and no such authority is found in the laws of Mississippi. The rates so fixed are binding upon consumers as

well as respondent. *Griffith* v. *Vicksburg Water Works Company,* 88 Miss. 371, 40 So. 1011. The right of a municipality to fix rates has been fully recognized by the bench and bar of Mississippi. In *City of Laurel* v. *Mississippi Gas Company,* 49 F. (2d) 219, District Judge Holmes, now a judge of the Circuit Court of Appeals for the Fifth Circuit, and familiar with the laws and procedure in Mississippi, says "The City of Laurel has the power to prescribe charges and reasonable rates for gas, provided they do not impair the obligation of any valid existing contract. Sec. 2426, Mississippi Code, 1930." The petition here necessarily seeks to suspend the old rate and substitute a new; to accomplish by indirection what respondent could not directly do; to violate the principles announced by the Court in *Aetna Casualty & Surety Company* v. *Quarles,* 92 F. (2d) 321, that "the object of the statute is to afford a new form of relief where needed, not to furnish a new choice of tribunals or to draw into the Federal Courts the adjudication of causes properly cognizable by Courts of the State." We submit, therefore, that this is essentially a rate case. It is true that the contract franchise provides that if the Jackson field becomes insufficient, respondent has the option to obtain natural gas from other fields, but "rates therefor shall be fixed hereunder that are just and reasonable." Exhibit "A", Sec. 5 (Tr. 24-25). To exercise this option, respondent in all events must have the City, as a rate-making body, fix rates for pipeline gas. This presents a separate question for the consideration of this Court, to-wit:

2. It was never the purpose of the Declaratory Judgment Statute to permit the trial of a cause piece-meal or to make any adjudication unless it disposes of the whole controversy. The effect of the judgment here complained of would be to permit the Federal District Court to try a purely fact issue when it has not the power to enforce its

judgment, and to justify its reasoning, the learned Court of Appeals eliminates any consideration of the averments pertaining to rates or the remedy to enforce any judgment, leaving to some other court or tribunal the application of the restricted declaration about the sufficiency or insufficiency of the Jackson gas field. Suppose the learned District Court finds that the Jackson field is insufficient. What then? What is the effect? It does not validate the new rates. It leaves the City of Jackson and its inhabitants without a rate, and leaves respondent without a contract. Instead of affording security to the parties, it leaves the fundamental issues undetermined. While the contract franchise has several provisions, it is after all one contract. It was never the purpose of the Declaratory Judgment Statute to authorize the Federal Court to try a purely fact issue without applying the law as to the substantive rights of the parties to the facts so found and entering a judgment disposing of the whole controversy. The fact issue as to the sufficiency or insufficiency of the Jackson gas field is only one issue in the case. What respondent is primarily interested in is the establishment of a new rate. It has not made the proper approach. It merely seeks to make the Federal District Court a commissioner or fact-finding agency without power to enforce its judgment. "The declaration of a right without the power to make it effective would appear at first impression to be a vain proceeding." *Lake Erie Provision Company* v. *Moore,* 11 Fed. Supp. 522. In prior litigation between these very parties, *Mississippi Power & Light Company* v. *City of Jackson,* 9 Fed. Supp. 564, Mr. Justice Holmes, then District Judge, said "as to relief in the State courts, Sec. 2426, Mississippi Code, 1930, provides that the Chancery Court shall have jurisdiction to review orders of municipal authorities in the matter of fixing rates to be charged by public service companies. * * * This court has no jurisdiction over the contro-

versy, not even under the Declaratory Judgment Act of June 14, 1934 (Sec. 274 d of Judicial Code, 28 U. S. C. A. Sec. 400), as that act only confers the power upon courts of the United States to declare rights and other legal relations of interested parties in cases of actual controversy over which the court otherwise has jurisdiction under the Constitution and laws of the United States. It does not extend the general jurisdiction of federal courts to new cases or controversies, but merely creates a new procedural institution or enlarged remedy for the limited classes of cases and controversies cognizable in these courts." The learned District Judge further held in that case that "irrespective of said Sec. 2426, the Chancery Courts of Mississippi have an independent equitable jurisdiction to prevent by injunction the enforcement of municipal ordinances which are void because confiscatory of the plaintiff's property. *Fitzhugh* v. *City of Jackson*, 132 Miss. 585, 97 So. 190, 33 A. L. R. 279."

If the Jackson field is insufficient, then many elements must be taken into account in the establishment of new rates, and all this cannot be done in the Federal Court. Respondent has wrongfully assumed to put into effect the new rate and then in effect to request the Federal District Court to approve its actions. It has no legal right to sit in judgment on its own case and then ask a validation proceeding in the Federal Court. Furthermore, as said by Mr. Justice Frankfurter in his concurring opinion in the recent case of *Driscoll* v. *Edison L. & P. Co.*, 307 U. S. 104, 122, "the determination of utility rates does not present questions of an essentially legal nature in the sense that legal education and lawyers' learning afford peculiar competence for their adjustment." The learned Circuit Court of Appeals cited for its justification *Aetna Life Insurance Company* v. *Haworth*, 300 U. S. 227, 81 L. Ed. 617. The issue there was practically a single issue, to-wit, whether the insured

"had become totally and permanently disabled and hence was relieved of the obligation to continue the payment of premiums," etc., and the learned Chief Justice observed "There would be no difficulty in either event in passing a conclusive decree applicable to the facts found and to the obligations of the parties corresponding to those facts." Here a different situation is presented. The learned District Judge could pass no conclusive decree applicable to the facts found and the obligations of the parties. All the Federal District Court could do would be to say that the Jackson gas field is insufficient without requiring either of the parties to do anything, with the result that we would have "confusion worst confounded."

3. When the learned District Judge sustained the motion to dismiss, the City of Jackson had pending a suit against respondent as shown by the admissions of learned counsel for respondent on page 27 of their brief in chief before the Circuit Court of Appeals, wherein they state "Incidentally, the City in the State court has filed a suit against this plaintiff seeking relief as follows:" and quoting the prayer for relief. The admissions of counsel may always be accepted at face value. "The trial court may direct a verdict upon the opening statement of counsel." *Oscanyan* v. *W. R. Arms Co.*, 103 U. S. 221, 26 L. Ed. 539. Mr. Justice Holmes, in prior litigation between the parties hereto, had expressly ruled that the Chancery Court has jurisdiction. The fact is that respondent removed this State court case to the Federal court, and the learned District Judge remanded the cause. The learned District Judge knew, therefore, that all of the issues between the parties, including the fact issue as to the sufficiency or insufficiency of the Jackson field was at issue in said State court action, a court of competent jurisdiction. He delivered no written opinion. The judgment simply dismisses the cause "for lack of juris-

diction." The court had the discretion to decline jurisdiction, among other reasons, the pendency of this State court action. "Whether the remedy shall be accorded one who petitions for it, is a matter resting in the sound discretion of the trial court, to be reasonably exercised in furtherance of the purposes of the statute." *Aetna Casualty & Surety Company* v. *Quarles,* 92 F. (2d) 321. "The granting of a Declaratory Judgment lies considerably within the discretion of the court, after mature consideration of all of the circumstances of the case." *Lumberman's Mutual Casualty Company* v. *McIver,* 27 Fed. Supp. 702. See Annotation 87 A. L. R. 1201, 1212, under the caption "Relief as being discretionary," wherein the learned editor says "As pointed out in previous annotations on the subject, the granting of declaratory relief is a matter as to which the court is entitled to exercise a judicial discretion according to the circumstances presented in the particular case." In *City of El Paso* v. *Texas Cities Gas Company,* 100 F. (2d) 501, the Circuit Court of Appeals for the Fifth Circuit, speaking by Mr. Justice Sibley, expressly approved the doctrine that notwithstanding technical jurisdiction the Federal Court should not interfere "in state matters until state remedies have been exhausted," and that this principle is founded "in comity rather than on want of power either as a federal court or as a court of equity," and in *Commonwealth of Pennsylvania* v. *Williams,* 79 L. Ed. 384, 96 A. L. R. 1166, this Court held that the Federal courts should exercise "their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." See also *Gilchrist* v. *Interborough Rapid Transit Company,* 279 U. S. 159, 73 L. Ed. 652. In *Railroad Commission of State of California* v. *Los Angeles Railway Corporation,* 74 L. Ed. 234, headnote 4 reads "The Supreme Court is bound by the decisions of the highest courts of the states as to the powers of their

municipalities." This power here embraces that of prescribing a reasonable rate. The learned District Judge therefore was familiar with the pleadings in the State court action, having reviewed them on motion to remand, and the prayer for relief quoted by opposing counsel demonstrates that the issue here presented is now pending in a State court of competent jurisdiction and the learned District Judge had intimate knowledge thereof and based thereon the right to exercise a sound discretion in declining jurisdiction on the petition for a Declaratory Judgment.

4. The opinion complained of, we submit, is contrary to the principles announced by other courts of equal dignity in reference to tax cases. The opinion concedes that the Declaratory Judgment Statute has an express exception "with respect to federal taxes." Suits to enjoin either State or Federal taxes would be excepted. The same section which delimits Federal jurisdiction to enjoin, suspend or restrain the enforcement, operation or execution of any order of a rate-making body, likewise provides that no district court shall have jurisdiction of any suit to enjoin, suspend or restrain the assessment, levy or collection of any tax imposed by or pursuant to the laws of any State, etc., under certain conditions. U. S. C. A. 28 Sec. 41 (1). In *Sears, Roebuck & Company* v. *Roddewig*, 24 Fed. Supp. 321, the statutory three-judge court, speaking for Judges Dewey, Sanborn and Bell, considered a bill of Sears, Roebuck & Company, a corporation, engaged in the business of retail merchandising, alleging that the Iowa sales tax statute was illegal and void as there administered and asked that the defendants be enjoined and restrained from entering any order canceling a permit issued to the plaintiff in operating 13 retail stores in Iowa. The Iowa State Board of Assessment and Review had adopted a resolution reciting the failure of the corporation to collect the use tax or

to make quarterly reports thereof in accordance with the mandatory provisions of the statute. The company did not appear at the hearing fixed by the Board, but instead filed its action in the Federal court. The defendants answered and also made a motion to dismiss for lack of jurisdiction. The court reached the conclusion that it had no jurisdiction, observing "A suit to enjoin a tax and a suit to enjoin the use of the means provided by the taxing statute for the collection of the tax would seem to be the substantial equivalents of each other." Let it be remembered that the plaintiff was simply asking that the defendants be enjoined from entering any order canceling any sales permit issued to it. The court further observed "In a broad sense this may properly be regarded as a suit to enjoin the collection of taxes—although there is much force in complainant's argument that it is merely a suit to prevent the Board from revoking complainant's right to do business in the State because of its justifiable refusal to act as a collection agent for the State with respect to its customers," etc. There was just as much sound reason for the court assuming jurisdiction in that case as there is in the case at bar. Turning then to another tax case, *William B. Scaife & Sons Company* v. *Driscoll, Collector of Internal Revenue* (C. C. A. 3rd) 94 F. (2d) 664, the appellant, a manufacturing corporation, filed with the Collector of Internal Revenue its capital stock return as a basis for capital stock tax and excess profits tax. Subsequently an amended return was prepared and transmitted to the Collector who refused to accept it. A bill was filed to have the tax "declared unconstitutional or, in the alternative, to enjoin the Collector from refusing an amended return in lieu of an original return." On dismissal of the bill, the plaintiff appealed. Notwithstanding the fact that the Johnson Act "specifically excluded questions of federal taxation from the operation of the Declaratory Judgment Act", the appellant urged that the Collector

should be compelled to accept and file the amended return. The Court of Appeals, among other things, said "if the appellant can succeed in this purpose, the tax thus assessed will be smaller in amount than that which would be assessed upon the basis of the first return. The suit at bar, therefore, is in reality one to restrain the assessment and the collection of a tax." Now, in the case at bar, if respondent can obtain a binding declaration that it is not bound by Exhibit "A", it necessarily follows that the proceeding is in reality one to enjoin or suspend the rates fixed by the City of Jackson as a rate-making body and agreed to by respondent as reflected in the contract franchise, Exhibit "A". In the last named case, the court also said "We are also of the opinion that appellant has an adequate remedy at law", and here at all times the Chancery Court of Mississippi has jurisdiction to review the reasonableness of rates. The provision that rates for pipeline gas would be established in event the Jackson field became insufficient was manifestly incorporated in the contract franchise to prevent respondent from being bound for the full period of twenty-five years if such contingency occurred. But the contract franchise does not, of course, undertake to fix the rates for pipeline gas, and they have never been fixed or agreed to. A municipality would have no authority to surrender its police power delegated to it by the Mississippi Legislature to fix rates by contracting with respondent that if it could not obtain a sufficient quantity of gas from the Jackson gas field, it would be at liberty to contract for pipeline gas at any schedule of rates which this utility company might think proper, and such was not the contemplation of the contract franchise.

The pronouncements of the lower court are contrary to the ruling of Holmes, District Judge, in *Mississippi Power & Light Company* v. *City of Jackson*, 9 Fed. Supp. 564, hereinabove referred to, and reflecting a similar controversy be-

tween these same parties. It conflicts with the principles announced in *Southern Pacific Company* v. *McAdoo,* (C. C. A. 9th) 82 F. (2d) 121, wherein the Court aptly said:

> "The Declaratory Judgment Act (Judicial Code, Sec. 274 i, 28 U. S. C. A. 400 and note) is limited in its operation to those cases which would be within the jurisdiction of the Federal Courts if affirmative relief were sought. Putnam *v.* Ickes, 64 App. D. C. 339, 78 F. (2d) 223, 226; Zenie Bros. *v.* Miskend (D. C. S. D. N. Y.) 10 F. Supp. 779, 781; Automotive Equipment *v.* Trico Products Corp. (D. C. S. D. N. Y.) 10 Fed. Supp. 736, 738; Miss. P. & L. Co. *v.* Jackson (D. C. S. D. Miss.) 9 Fed. Supp. 564, 570; Hary *v.* United Electric Coal Co. (D. C. E. D. Ill.) 8 Fed. Supp. 655, 656. See, also, U. S. *v.* West Virginia, 295 U. S. 463, 475, 55 S. Ct. 789, 79 Law Ed. 1546. The mere fact that a declaratory judgment is sought is not, of itself, a ground for Federal jurisdiction."

It will be observed that among other authorities cited by the Court in the above quotation is the case of *Mississippi Power & Light Company* v. *City of Jackson,* decided by Judge Holmes, now a member of the Circuit Court of Appeals for the Fifth Circuit, but taking no part in the decision here complained of. It is contrary to the decision in *Davis* v. *American Foundry Equipment Company,* 94 F. (2d) 441, wherein the Court, among other things, said "There must exist, as heretofore, the essential grounds for Federal jurisdiction. * * * The law created no new substantive rights or legal relationships but added to the remedies previously existing, an additional one for relief in the form of a judgment declaring, in cases of actual controversy, the rights of the parties." It conflicts with the observations of the District Court in *Lake Erie Provision Co.* v. *Moore,* 11 Fed. Supp. 522, that "The declaration of a right without the power to make it effective would appear at first impression to be a vain proceeding. * * * Re-

lief under the Declaratory Judgment Statute only may be had where the Court has jurisdiction (includes power) to grant it." It seems to be conceded even by the Circuit Court of Appeals that here the Federal District Court would have no power to grant ancillary relief. As already observed, *supra*, it conflicts with the pronouncements of the Court in *U. S. F. & G. Company* v. *Koch*, 102 F. (2d) 288, upholding the discretionary power of the Court, especially where the judgment "will not finally settle the rights of the parties."

The opinion is not justified, but, on the contrary, conflicts with the opinion of this Court in *Aetna Life Insurance Company* v. *Haworth, supra*, for the reason that in the *Haworth* case this Court held that "a conclusive decree applicable to the facts found and to the obligations of the parties corresponding to those facts" could be entered without difficulty. Here a different situation is presented. No decree could be entered with reference to the new and higher rates, and at most the District Court could only determine one fact issue in a case involving many issues, both of law and fact.

Conclusion.

We have attempted, briefly, to show that this is an important question of jurisdiction; that a final decision on this important question of jurisdiction by this Court would be to the best interest of both parties; that the learned District Court was right in dismissing this cause for the several reasons assigned. It is respectfully submitted that the petition for certiorari should be granted.

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